THE MONTH IN PENNSYLVANIA WORKERS' COMPENSATION:
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OCCUPATIONAL DISEASE

- The presumption in Section 301(f) of the Act applies only where the firefighter has shown that his cancer is an occupational disease under Section 108(r) of the Act.

  In this matter the WCJ did not err by denying the claimant's Claim Petition because claimant's medical evidence did not establish that squamous cell carcinoma was a type of cancer caused by Group 1 IARC carcinogens, and this was necessary in order to establish that his cancer was an occupational disease under Section 108(r) of the Act.

  Accordingly, the presumption in Section 301(f) of the Act was unavailable to Claimant.

  Nevertheless, Claimant was able to pursue compensation for his cancer as "causally related to his industry or occupation" under Section 108(n) of the Act. This required Claimant to prove all elements to a Claim Petition, including a causal connection between his work and his cancer, which the claimant did not do because his medical evidence was rejected...

- Section 108(R) of the Occupational Disease Section added cancer to the list of occupational diseases for firefighters by stating:

  > *Cancer suffered by a firefighter which is caused by exposure to a known carcinogen which is recognized as a Group 1 carcinogen by the International Agency for Research on Cancer.*

  Section 108(r) requires the firefighter to show that the Group 1 carcinogens, to which he was exposed, have been shown to cause the type of cancer suffered by the claimant. Only after a firefighter establishes that his cancer is an occupational disease under Section 108(r) of the Act do the rebuttable presumptions in Sections 301(e) and (f) come into play.

Section 301(e) of the Act establishes a "presumption regarding occupational disease" that applies to any occupational disease sustained by any employee in any line of work. It states:

> *If it be shown that the employe, at or immediately before the date of disability, was employed in any occupation or industry in which the occupational disease is a hazard, it shall be presumed that the employe's occupational disease arose out of and in the course of his employment, but this presumption shall not be conclusive.*

However, there is a special presumption where the occupational disease is cancer and the employee is a firefighter. Act 46 added Section 301(f) to the Act related to compensation for cancer suffered by a firefighter. It states as follows:

> *Compensation pursuant to cancer suffered by a firefighter shall only be to those firefighters who have served four or more years in continuous firefighting duties, who can establish direct exposure to a carcinogen referred to in section 108(r) relating to cancer by a firefighter and have successfully passed a physical examination prior to asserting a claim under ….Notwithstanding the limitation under subsection (c)(2) with respect to disability or death resulting from an occupational disease having to occur within three hundred weeks after the last date of employment in an occupation or industry to which a claimant was exposed to the hazards of disease, claims filed pursuant to cancer suffered by the firefighter under section 108(r) may be made within six hundred weeks after the last date of employment in an occupation or industry to which a claimant was exposed to the hazards of disease. The presumption provided for under this subsection shall only apply to claims made within the first three hundred weeks.*

Capaldi v. WCAB (City of Philadelphia), No. 787 C.D. 2016 (Decision by Judge Leavitt, January 9, 2017) 1/17

IMPAIRMENT RATING EVALUATION

- The Pennsylvania Supreme Court reverses the Commonwealth Court and holds the physician-evaluators who performs the IRE is not constrained by the specific nature of injury recognized by the Notice of Compensation Payable. A physician-evaluator has an obligation to address all work-related conditions at the time of the evaluation. Therefore, the physician-evaluator is required to determine the range of impairments which may be "due to" the work injury.

  This is because the purposes of the AMA Guides, is assessed, in the first instance, by reference to an "event" rather than an "injury," thus creating some potential tension with Section 306(a.2)'s focus on causal association with a compensable

injury. The Physician-Evaluator is bound to take his guidance, not from Employer, but from Section 306(a.2) and the AMA Guides.

Section 306(a.2) explicitly invests in physician-evaluators the obligation to determine the degree of impairment due to the compensable injury. The statutorily prescribed duty set forth by Section 306(a.2) is simply to assess "the degree of impairment due to the compensable injury" on a "whole body" basis

Per such express terms, a physician-evaluator must consider and determine causality in terms of whether any particular impairment is due to the compensable injury. This means the required evaluation is of the percentage of permanent impairment of the whole body resulting from the compensable injury.

The physician-examiners must exercise independent professional judgment to make a whole-body assessment of the degree of impairment due to the compensable injury.

- In this matter the Physician-Evaluator did not apply professional judgment to assess the psychological conditions identified by Claimant during the IRE examination; nor did he determine whether such conditions as might have been diagnosed were fairly attributable to Claimant's compensable injury. Instead of abiding by the directives of Section 306(a.2) and the AMA Guides in such regards, the Physician-Evaluator purported to take a different set of instructions from Employer

- The Commonwealth Court was reversed because its holding that the Notice of Compensation payable should define the compensable injury to be examined by the IRE does not determine the range of impairments which may be "due to" such injury

- In dicta the court comments that if the Fourth Edition of the AMA Guides to the Evaluation of Permanent Impairment does not permit the rating of mental and behavioral impairments it may well be that the statute should simply be deemed incapable of enforcement as applied, and no conversions to partial disability should occur for claimants who suffer from serious work-related psychological impairments.

Duffey v. (Trola-Dyne, Inc.), No. 4 MAP 2016 (Chief Justice Saylor, January 19, 2017)1/17

IMPAIRMENT RATING EVALUATION

- An Impairment Rating Evaluation (IRE) performed upon the clamant on April 28, 2003 that resulted in an IRE of less than 50% and was subject to a Petition to Review filed on August 28, 2012, which alleged the IRE Examiner failed to

consider the full extent of her injuries, was not invalid although the IRE was based upon the Fifth Edition of the AMA Guides notwithstanding the Commonwealth Court decision in Protz v. WCAB(Derry Area School District), 124 A.3d 406 (Pa. Cmwlth. 2015), appeal granted by 133 A.3d 733 (Pa. 2016).

This is because a claimant has 60 days under Section 306(a.2) (2) of the Act to appeal a reduction in disability benefits following a Notice prior to the reduction becoming final. After the 60 day period has run that claimant may only challenge the IRE based upon the argument that his/her IRE is now 50% or greater and this must be done during the 500 week period that runs from the date the IRE was performed,.

Here, Claimant did not appeal within that time period, thereby waiving the right to challenge the 2003 IRE determination and claimant did not produce evidence her IRE was 50% or greater. Protz does not give Claimant a second chance to appeal her 2003 IRE. Claimant failed to raise her claim within the parameters of section 306(a.2) (2) of the Act.

- This holding is consistent with the Commonwealth Court decision of Johnson v. WCAB (Sealy Components Group), 982 A.2d 1253 (Pa. Cmwlth. 2009) that held under Section 306(a.2)(4) an employee may appeal the IRE determination at any time during the 500 week period of partial disability, but after the 60 days that runs from the issuance of the Notice of the Modification, the appeal may only be based upon the allegation that the employee meets the threshold impairment rating that it is equal or greater than 50 percent.

  The claimant was not able to argue the IRE was invalid because it was premised upon the 5th Edition of the AMA Guides because the plain language of Section 306(a.2) (4) mandates that the only bases for an appeal more than 60 days following the issuance of the Notice of Change is that the claimant's impairment rating is 50 percent or greater.

Riley v. WCAB Commonwealth of Pennsylvania), No. 238 C.D. 2016 (Decision by Judge Hearthway, Decided December 8, 2016) 1/17